In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1644

J. B. GUNN,
Petitioner,

VS.

MICHAEL D. POULIN,
Respondent.

REPLY TO BRIEF IN OPPOSITION

EVELLE J. YOUNGER,
Attorney General of the State of California.

JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.

EDWARD P. O'BRIEN,
Assistant Attorney General.

CLIFFORD K. THOMPSON, JR.,
Deputy Attorney General.
6000 State Building.
San Francisco, California 94102.
Telephone: (415) 557-0204.
Attorneys for Petitioner.

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ARGUMENT

THE DECISION BELOW SHOULD BE REVERSED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF WAINWRIGHT v. SYKES.

After petitioner applied for a writ of certiorari the Court announced its opinion in *Wainwright v. Sykes,* ___ U.S. ___, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). *Sykes* repudiated the Ninth Circuit's view, expressed below, that *Francis v. Henderson,* 425 U.S. 536 (1976), and *Davis v. United States,* 411 U.S. 233 (1973), "were confined to pretrial objections to grand jury composition" and that "nothing in *Francis* pur-

ports to overrule *Fay* [*v. Noia,* 372 U.S. 391 (1963)], sub silentio or otherwise" (Pet. for Cert., App. A, p. v). Instead, *Sykes* validated the state's position: "The state protests that to overcome a failure to object properly at trial the prisoner must show 'cause' for the failure as well as 'actual prejudice' . . ." (Pet. for Cert., App. A, p. iv).

It is plain that the opinion below can neither be reconciled nor coexist with *Sykes.* Respondent's efforts to distinguish *Sykes* because it involved evidence excludable on Fifth Amendment rather than Sixth Amendment grounds and involved a failure to object before rather than during trial must fail. *Sykes* explicitly dealt with state rules requiring contemporaneous objections at trial and held:

> "We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that petitioner's confession be challenged *at trial* or not at all. . . ." 53 L.Ed.2d at 608, 97 S.Ct. at 2506. (Emphasis supplied.)

Petitioner insists that Sixth Amendment rights so surpass Fifth Amendment rights in importance that the former may be deliberately bypassed but not procedurally defaulted. If, as he suggests, not all federal rights are of equal stature, it is no less true that all failures to object to inadmissible evidence at trial have an equal impact on the state's administration of criminal justice: that of requiring unnecessary retrials and depriving prosecutors of timely opportunity to present alternative proofs. Assuming that the attorney-client privilege is constitu-

tionally compelled, its violation would not relieve the defendant of the obligation to object to evidence resulting from its breach. Moreover, it has never been established that petitioner's privilege was breached.

Respondent next urges that the state has forgiven his procedural default by considering his Sixth Amendment claim on appeal. The warden's petition points out that federal courts may not penalize a state's attempt to consider a federal claim made futile by a barren record resulting from the claimant's failure to object (Pet. for Cert., 9 n. 1).

None of this Court's decisions forecloses application of the *Sykes* rule to respondent's case. Nor does *Curry v. Wilson,* 405 F.2d 110, 112 (9th Cir. 1968), cited by respondent. While disallowing the state the benefit of the deliberate bypass doctrine because its appellate court overlooked the want of a trial objection in order to reach a federal claim, the Ninth Circuit nevertheless held the federal claim waived in *Curry* because defense counsel deliberately withheld objection. The difference between a "deliberate bypass" and a "'waiver' in the *Curry v. Wilson* sense," *Miller v. Carter,* 434 F.2d 824, 825 (9th Cir. 1970), awaits full elaboration.

At all events, the Ninth Circuit did not hold that the state was estopped from claiming waiver. On the contrary, that court observed "there is no suggestion that the failure to object amounted to a tactically-inspired, or otherwise deliberate, bypass of state procedures" (Pet. for Cert., App. A, p. ii).

Finally, respondent argues that his case is inappropriate for review in this Court because there has been no factual inquiry into the "cause" of his attorney's failure to object. This point has some merit.

Ultimately, this case is likely to be decided upon the basis of testimony given by respondent's trial attorney at a future evidentiary hearing in the United States District Court. It may well be that defense counsel will explain his failure to object on the ground that the jurors were closer to Poulin when he incriminated himself than was the bailiff who heard and recounted the admission. If counsel does not so testify, "cause" and the existence of the attorney-client privilege may be established.

Should this Court simply deny the petition, however, the District Court will feel bound by the Ninth Circuit's opinion to reassemble the entire cast of Poulin's 1971 state trial in order to determine whether "any other persons" overheard his incriminating remark to his attorney (Pet. for Cert., App. A, p. iii). The State of California will be spared this unnecessary extravaganza, occasioned by Poulin's failure to object six years ago, if this Court grants the petition for a writ of certiorari, reverses the decision below, and remands the case for reconsideration in light of

Wainwright v. Sykes. Only then can we be assured that *Sykes* will be spared the same grudging interpretation given *Davis v. United States* and *Francis v. Henderson* in the opinion below.

Dated, October 17, 1977

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
CLIFFORD K. THOMPSON, JR.,
Deputy Attorney General,
Attorneys for Petitioner.